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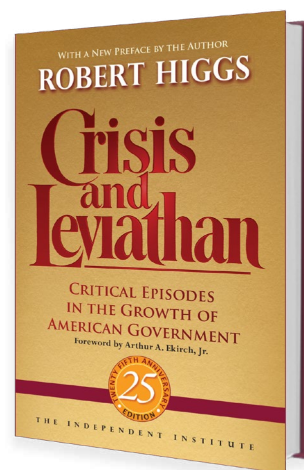

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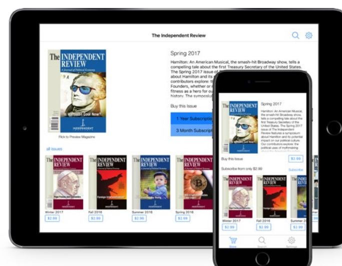

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Can a Reparations Package Be a Bill of Attainder?

MATHEW MANWELLER

> Aristotle once observed that to give money away is an easy matter and in any man's power, but to decide to whom to give it, for what purpose and how, is neither in every man's power nor an easy matter.
>
> **—Justice Oaks, *Lamont v. Woods*[1]**

Everybody, it seems, is in the mood to apologize. The U.S. Congress has considered apologizing to African Americans for the country's history of slavery.[2] During his term in office, President Clinton offered multiple apologies: to the Rwandan people for lack of U.S. action during Rwanda's ethnic civil war; to native Hawaiians for nineteenth-century imperialism; to survivors of the infamous Tuskegee experiments (Brooks 1999). The Catholic Church recently apologized for the Inquisition and the Holocaust (Bohlen 1997). The Japanese government, under pressure, apologized for abusing Korean "comfort women" during World War II. In one of the more unusual cases, Aetna, an insurance company, apologized for selling policies to slave owners in the 1850s. Some political and social activists have gone a step further and pushed Aetna, as well as governmental institutions, to pay reparations for their acts of more than a century ago. The apparent "contrition chic" that has descended over the twenty-first century has led Roy Brooks to label this century the "Age of Apology" (1999, 3).

There is a difference, however, between apologizing in the rhetorical sense and apologizing in the form of reallocating resources to compensate for past wrongs. In

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1. 948 F 2d. 825 (1991), at 829, quoting Aristotle's *Nichomachian Ethics*, bk. 2, chap. 9.

2. See "The Apology for Slavery Resolution of 2000," H. Con. Res. 356, introduced by Representative Tony Hall (D-Ohio).

The Independent Review, v.VI, n.4, Spring 2002, ISSN 1086-1653, Copyright © 2002, pp. 555–571 .

the past decade, proposals or demands for the latter have become increasingly popular. Japanese Americans interned during World War II have collected $1.6 billion in reparations. The state of Florida passed a reparations package of $2 million for survivors of the infamous Rosewood Massacre.[3] Currently, the state of Oklahoma is considering a $33 million package to atone for the Tulsa race riot of 1921 (Yardley 2000). Unlike a state or national legislature's resolution of apology, however, the reallocation of resources as a form of apology raises pragmatic, ethical, logistical, and, as I assert here, constitutional questions.

Concentrating on the constitutional questions, we might borrow a phrase from General Douglas MacArthur: old constitutional clauses "never die, they just fade away."[4] Unlike old soldiers, however, constitutional clauses have a tendency to come back to life when you least expect them to do so. Such is the case of Article I, sections 9 and 10, of the U.S. Constitution, forbidding bills of attainder. A bill of attainder is created when a legislature, instead of a court, finds an individual or easily ascertainable group guilty of some crime and exacts a punishment. James Madison, always fearful of a legislature's susceptibility to the sudden impulses and passions of the populace, believed that the bill of attainder clauses would deny Congress the ability to punish individuals or minority groups (see his statement in Jay, Madison, and Hamilton [1787–88] 1983, 227). He and others were aware that the courts were more insulated from public passions and therefore more appropriate bodies to decide guilt or innocence and to impose punishments. The Founders hoped to avoid a repetition of the episodes in English history in which Parliament seized property from individuals who had not been convicted in court. In this article, I maintain that reparations packages do exactly what Madison feared. In my view, a legislature's use of public funds to compensate groups for "historical crimes" constitutes enactment of bills of attainder, and such acts ought to be found unconstitutional.

What Is a Reparations Package?

Roy Brooks presents a detailed typology of reparations (table 1). He first identifies the notion of remorse. If a redress includes a sense of atonement, it is considered reparations. If no atonement is expressed, the redress is considered a settlement. The reparations half of the dichotomy may be further subdivided into monetary and nonmonetary reparations. The latter include nonexclusive social programs (welfare), amnesty, and affirmative action. Monetary reparations may be classified as compensatory or rehabilitative. Compensatory reparations are given to an individual; they are intended to return an injured party to his condition prior to his victimization. Rehabilitative reparations are given to groups; they seek to "repair" a community or a culture.

3. See Florida H.B. 591 (1994).

4. In MacArthur's address to a joint session of Congress on April 19, 1951, of course, the reference was to "old soldiers."

Table 1
Types of Reparations

Reparations			**Settlement**
Intended as an apology			No apology intended.
Monetary		**Nonmonetary**	
Compensatory	Rehabilitative	Social Programs Amnesty Affirmative Action	
Cash payment given directly to individuals.	Resources given to a community or group. Education credits Job training Empowerment zones		

Source: Brooks 1999, 8

This typology is helpful when one examines various proposals for slave reparations. Using Brooks's classification, we see that because redresses for slavery would be a form of apology, they would constitute reparations, not a settlement. Much of the debate focuses on how the compensation would take place. Many commentators have argued that nonmonetary reparations have already been paid in the form of Great Society social welfare programs (Smith 1999). Those who disagree and contend that monetary reparations are needed to compensate fully for the country's history of slavery disagree as to whether those reparations should be compensatory or rehabilitative. Some advocates call for individual monetary payments, others for empowerment zones, education credits, and other forms of rehabilitative compensation. Some proposed reparations blend compensatory and rehabilitative elements. For example, certain advocates have called for a publicly funded trust to be established for African Americans. Individual African Americans would be allowed to apply for business or educational grants from the trust (see Robinson 1999; Westley 1998).

All of the reparations packages I identify in table 2 in the next section are monetary reparations packages, but compensatory and rehabilitative packages are distributed roughly equally in the list. I have excluded nonmonetary reparations packages from my data set. Their number would be prohibitively large, nor is it my argument that nonmonetary reparations packages violate the Constitution's bill of attainder clause.

Reparations Packages on the Rise

The use of reparations packages to remedy historical wrongs received increased attention after the U.S. government agreed to pay $20,000 to each surviving person of Japanese descent interned during World War II. Since that time, proposals of reparations packages have increased significantly. Nor does the issue seem poised to fade from political radar screens soon.[5] Table 2 provides a brief overview of all the reparations packages that in the past twenty years have been paid, have been put into the process of being paid, or have been suggested as a potential remedy. Where dollar amounts are missing from the table, there is no agreed upon amount.

In reaction to the number of reparations proposals, a number of normative arguments have been raised to support or to oppose reparations packages. Some Jewish and African American civic leaders oppose reparations on the grounds that such transfers amount to "blood money," and they view reparations as a betrayal of the dead (Barkan 2000, 9). Others see reparations packages in a more positive light and view them as a way to "recognize and acknowledge" victims and to provide "closure" for the offending nation (Ignatieff 2000, A20).

From a different perspective, some officials worry that reparations will lead to a never-ending cycle. Representative Milacek of the Oklahoma legislature asked the obvious question, "Where does it end?" (qtd. in Yardley 2000, A1). His question illustrates the uncomfortable fact that, given the many incidents of violent wrongs committed throughout history, we would never run out of episodes from which to derive a claim for someone's compensation.

Still others, such as Hawaiian-reparations opponent Roy Benham, ask, "Who does the United States give it to?" (qtd. in Associated Press Staff 1999, A1). A variety of questions might be raised about eligibility for reparations. Would slave reparations go to millionaire African Americans? What percentage of one's ancestors would have to be African American to make him eligible? Would reparations go to African Americans who immigrated to the United States after the Civil War? The recent uproar at Brown University, where a school newspaper advertisement criticizing the idea of slavery reparations prompted students to storm the editor's office and shut down the paper, illustrates how intense the debate over these questions can be (Godbold 2001).

And, finally, one might question who is responsible for paying the reparations. David Horowitz, an ardent opponent of slavery reparations, asks, "What rationale would require Vietnamese boat people, Russian refuseniks or Iranian refugees . . . to pay reparations?" (qtd. in Godbold 2001). Behind the simplistic notion that wrongs should be righted are complicated questions about who should bear responsibility for historical crimes. A long list of questions could be added to Horowitz's list. Would Americans whose ancestors immigrated to the United States after 1865 still be held responsible for

5. In July 2001, the Bush administration threatened to boycott the United Nations conference on racism in Durban, South Africa, if reparations for slavery were placed on the agenda.

Table 2
Present and Proposed Reparations

Historical Event	Party Seeking Reparations	Amount Paid or Proposed	Institution to Pay or Paying Reparations
WWII Japanese internment	Japanese American internees	$1.6 billion	U.S. government
WWII internment of Japanese living in Latin America	Japanese living in Latin America who were interned by U.S. government	$5,000 per person	U.S. government
Slavery in United States	Descendants of slaves	$1.6 trillion	U.S. government
Holocaust victims	Holocaust victims and descendants	$60 billion	German government
Holocaust victims – Swiss banks	Holocaust victims and descendants	$1.25 billion	Swiss banks
Holocaust victims – U.S. corporations	Holocaust victims and descendants		Various U.S. corporations
Holocaust victims – German corporations	Holocaust victims and descendants	$5 billion	German corporations
Holocaust victims – Austrians	Holocaust victims and descendants	$5,000 per person	Austiran government
Holocaust victims – Poland	Holocaust victims and descendants		German government
Holocaust – Catholic Church	Surviving forced laborers	$2,200 per person	Catholic church
Rosewood massacre	Massacre survivors	$2 million	Florida State government
Tulsa race riot	Riot survivors	$12 million	Oklahoma State government
Arkansas race riots	Riot survivors		Arkansas State government
Attica Prison riot	Harmed prisoners	$12 million	New York State government
Overthrow of Hawaiian monarchy	Native Hawaiians	"several billion"	U.S. government
Sand Creek massacre	Cheyenne and Arapaho descendants of survivors		U.S. government
Bikini Atol atomic tests	Current Bikini residents	$560 million	U.S. government
No Gun Ri massacre	Korean citizens		U.S. government
Rape of Nanking	Several civic and political groups		Japanese government
Guatemalan Civil War	Families and descendants of victims		Guatemalan government
Rwandan civil war	Organization for African Unity		U.S. government
German-Namibian War	Namibian citizens		German government
Bombing of Iraq	Iraqi government		U.S. government
U.S. gun manufacturers	Several U.S. cities		29 separate gun manufacturers
U.S. corporations involved in slave trade prior to Civil War	Deadria Farmer-Paellmann		Various U.S. corporations
Canadian reeducation of native populations	Native Canadians	$250 million	Several Canadian churches; the Canadian government

the evils of slavery? What about the descendants of Union soldiers who fought and in hundreds of thousands of cases died in the war that brought about the destruction of slavery in the United States? Should they receive an exemption from liability?

Much has been written about the normative arguments related to reparations packages (for reviews of the literature, see Barkan 2000; Bergmann 1927; Brooks 1999; and Capman 1991). I do not seek to repeat or to add to those arguments. For the purposes of this article, I wish to put aside the normative debates and to focus instead on a potential constitutional restraint on the use of reparations packages—namely, that reparations packages violate the Constitution's bill of attainder clause.

What Is a Bill of Attainder?

There is little argument that the bill of attainder is an obscure aspect of the Constitution. In fact, only five acts of Congress have ever been overturned on bill of attainder grounds. The most recent case was *United States v. Brown* (1964), in which the Court invalidated section 504 of the Labor-Management Reporting and Disclosure Act, which made it a crime for union office holders to be members of the Communist Party. Despite the infrequency of challenges based on the bill of attainder clause, cases do arise from time to time that test its applicability. Lawyers for SBC Communications succeeded in briefly reviving the clause in a district court before being overruled in the Fifth Circuit in *SBC Communications, Inc. v. FCC* (1999).

The U.S. Supreme Court has defined bills of attainder as legislative acts that inflict punishment on named individuals or members of an easily ascertainable group without a judicial trial (*United States v. Lovett* [1946]). Such bills have a long history.

Originally, bills of attainder were used to seize property from named individuals, to prevent them from inheriting property or to ensure that no one inherited from them—a condition known as "corruption of blood" (Taylor 1907). Not all attainder bills applied to individuals; some applied to easily ascertainable groups of people, such as political enemies of those in office.

Accompanying bills of attainder were bills of pains and penalties, which were limited to seizing property, whereas bills of attainder included execution. Bills of pains and penalties were widely used during the American Revolution in order to confiscate the property of English loyalists.[6] As a result of their earlier experiences with bills of attainder and bills of pains and penalties, the Framers abolished them in the U.S. Constitution. The Framers worried that passionate public bodies might usurp judicial powers and thereby abuse minority factions or individuals. In *The Federalist No. 44,* Madison notes his objections to bills of attainder, ex post facto laws, and laws impairing the obligation of contracts:

6. Justice Douglas offers a brief history of the use of bills of pains and penalties in his dissenting opinion in George Campbell Paint Corp. v. Ried (1978). He cites their use in Delaware, New Jersey, and North Carolina prior to the adoption of the U.S. Constitution.

> Bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation. The two former are expressly prohibited by the declarations prefixed to some of the State Constitutions, and all of them are prohibited by the spirit and scope of these fundamental charters. Our own experience has taught us nevertheless, that additional fences against these dangers ought not to be omitted. Very properly therefore have the Convention added this constitutional bulwark in favor of personal security and private rights; and I am much deceived if they have not in so doing as faithfully consulted the genuine sentiments, as the undoubted interests of their constituents. (Jay, Madison, and Hamilton, [1787–88] 1983, 227)

Eventually, in *Fletcher v. Peck* (1810), the U.S. Supreme Court obliterated the difference between bills of attainder and bills of pains and penalties, ruling that the bill of attainder clause in the Constitution also refers to bills of pains and penalties in the historical sense. As a result, the Court expanded the scope of the attainder clause. In general, the Court accepts any punishment, whether it takes the form of death, fines, or denial of a specific right, as grounds for an attainder claim.

Supreme Court Case Law

Bill of attainder case law began developing after the Civil War, when some states started requiring public employees to take loyalty oaths swearing that they had never aided the Confederacy. Those who refused to take the oath were considered de facto guilty by law. In *Cummings v. Missouri* and *Ex Parte Garland* (1866), the Supreme Court struck down the oath requirement as a bill of attainder. In addition, the Court declared that the courts would take a broad view of what constituted a punishment, despite the government's claim that requiring an oath or denying employment did not constitute a punishment.

For eighty years after *Cummings,* the bill of attainder clause remained nearly dormant. (In *Pierce v. Carskadon* [1872], the Court again struck down an oath requirement, but it denied attainder status to bills that required minimum qualifications for doctors in 1900.) Then, in the 1940s and 1950s, the Red Scare provided fertile ground for its reemergence.

The first modern attainder case was *United States v. Lovett* (1946). In 1943, Congress passed an appropriations rider denying salaries to three government officials who were suspected of being communists. For the first time in American history, Congress had subjected specifically named individuals to a statutory penalty. The Supreme Court nullified the rider. However, the case did generate disagreement about what constitutes a bill of attainder. Justice Frankfurter, in a concurring opinion, developed his own definition, arguing that acts of Congress constitute bills of attainder only if they seek retribution for past acts and if the legislature intends them as a

punishment. In the highly charged atmosphere of the McCarthy era, Justice Frankfurter's more narrow definition became the norm.

A variety of plaintiffs who had been persecuted for belonging to the Communist Party sought relief under the attainder clause,[7] but the Supreme Court rejected all of these claims. In each of these cases, the Court applied Frankfurter's very narrow and technical definition of punishment. After the hysteria of the Red Scare subsided, however, the Court returned to the traditional, more expansive view of punishment established by the majority in *Lovett*. Moreover, in *Communist Party of the United States v. Subversive Activities Control Board* (1961), the Court began to examine Congress's intent in passing the challenged legislation. The justices concluded that if the intent was to create a hardship, then the act constituted a punishment, and it was therefore a bill of attainder.

In *United States v. Brown* (1965), the Supreme Court continued to move away from the narrow view of punishment and began to develop a "functional" approach to attainder cases. First, the decision reaffirmed that bills of attainder may apply to identified groups as well as to individuals. Second, the Court declared that "legislative punishment of any form or severity, of specifically designated persons *or groups*" (my emphasis) constitute a bill of attainder: "It would be archaic to limit the definition of punishment to retribution. Punishment serves several purposes: retribution, rehabilitative, deterrent and preventive" (qtd. in Sheehan 1993, 244). Notably, the decision in *Brown* began to draw a distinction between punishment and regulation that would become important in later cases.

The most important modern attainder case is *Nixon v. Administrator of General Services* (1977). President Richard M. Nixon challenged a congressional edict that required him to turn over his papers and tape recordings to the General Services Department. He claimed that because Congress had singled him out as a specific individual, it had violated the attainder clause. The Supreme Court disagreed, arguing that turning over papers is not a punishment and therefore that Congress's specifically naming him was irrelevant. The decision was significant, nevertheless, because it established a three-pronged test for future attainder cases.

One of the Supreme Court's important functions is to establish criteria that allow ambiguous clauses in the Constitution to be applied to modern events. Because the Framers could not foresee every contingency, the Court must flesh out vague constitutional language by establishing "tests" that allow modern jurists to determine whether specific actions meet general standards. With respect to bills of attainder, the courts have created a variety of tests.

The definition of a bill of attainder, established in *Lovett* and confirmed in *Brown,* is "a legislative act that inflicts punishment on named individuals *or easily ascertainable groups* without judicial trial" (381 U.S. 437, at 448–49, my emphasis). However, this definition has not always been sufficient to determine whether a bill of

7. See *American Communications Ass'n v. Douds* (1947), *Garner v. Board of Public Works* (1951), and *Flemming v. Nestor* (1960).

attainder has been created. There has been considerable judicial debate over the proper definition of *punishment* and *easily ascertainable group*.

Determination of whether a punishment has been inflicted has occupied most of the Court's energy. Some jurists have offered expansive views of what constitutes a punishment; others have offered very narrow definitions. James Madison entered the debate in 1794, as Congress was considering a bill that expressed public disapproval of a number of politically active groups that were inciting people to agitation. Madison declared that the resolution constituted a bill of attainder, explaining, "It is in vain to say that this indiscriminate censure is no punishment. If it falls on classes, or individuals, it will be a severe punishment" (4 *Annals of Congress* 935 [1794]). Justice William O. Douglas appears to agree with Madison in his dissent in *George Campbell Paint Corp. v. Ried* (1968), where he argues, "In the old days when a culprit, unpopular person, or suspect was punished by a Bill of Attainder, the penalty imposed often reached not only his own property, but also interests of his family. When the present law blacklists this family corporation, it has a like impact" (392 U.S. 286, at 290).

As we have seen, Justice Frankfurter had a much stricter definition of punishment. He contended in *Lovett* that bills of attainder are "defined by history" and therefore not open to interpretation, and he argued that acts of Congress constitute bills of attainder only if they seek retribution for past acts and if the legislature intended them as a punishment.

Competing definitions of punishment have led to cycles of constitutional interpretation with respect to bills of attainder. After the Civil War, loyalty oaths were struck down, but during the Red Scare, loyalty oaths were upheld. When named individuals were denied salaries in the Lovett case, the Court agreed that punishment had been inflicted, yet when Congress demanded that President Nixon turn over his personal tapes and papers, the Court declared that no punishment had been inflicted. In the Nixon case, the Court sought to cut through the confusion by establishing concrete standards for determining if Congress had imposed a punishment. This three-pronged test asks (1) "whether the challenged statute falls within the historical meaning of legislative punishment"; (2) whether the statute, "viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes"; and (3) whether the legislative record "evinces a congressional intent to punish" (*In Re McMullen,* 989 F.2d 603, at 612). Recent commentators refer to these criteria as the historical test, the functional test, and the motivational test.

The historical test is very narrow. If the punishment imposed is not one of the historical punishments associated with bills of attainder, the statute fails this test. Historically, these punishments have been limited to death, banishment, imprisonment, confiscation of property, and bars (for nonregulatory purposes) to participation in vocations.[8]

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8. The Court notes that barring blind people from working as pilots is not a bill of attainder because it has a regulatory purpose. See *SBC Communications, Inc. v. FCC* (1999) and *Garner v. Board of Public Works of Los Angeles* (1951).

The functional test expands the scope of the historical test by recognizing that "new burdens and deprivations might be legislatively fashioned that are inconsistent with the Bill of Attainder guarantee" (*Nixon v. Administrator of General Services,* 433 U.S. 425, at 475). This test rejects Frankfurter's narrow and debilitating interpretation of the clause. It asks, "Could the law under challenge reasonably be said to further nonpunitive legislative purposes in view of the type and severity of the burden imposed?" (ibid., 475–76). Simply put, even if the bill does not impose a historical punishment, is its "function" designed to punish in other respects?

The motivational test examines the legislature's intent. The Supreme Court has declared that if there was no intent to punish, then no bill of attainder exists. This test requires the Court to determine whether a legitimate state objective is being sought and whether a less burdensome, alternative means of reaching that objective exists. In modern case law, the Supreme Court has examined intent by distinguishing between bills that are regulatory, or "nonpunitive," in nature, and those that intend to inflict punishment or to seek "retribution." In *Brown,* the Court established the doctrine that if it cannot not find some regulatory purpose underlying an act, a punishment has been inflicted.[9] Since *Brown,* the Court has shown abundant flexibility in interpreting the concept of *regulation*.[10] In a recent case, however, resistance has been voiced regarding too loose an interpretation of *regulatory purpose*.[11] Justice Smith, of the District of Columbia Court of Appeals, has argued that "prophylactic measures" that seek to prevent future violations of the law are still bills of attainder. The District Court in Minnesota agreed in considering a bill that denied financial aid to students who had not registered with the Selective Service Administration. The decision in *Doe v. Selective Service System* argued there was intent to punish by denying benefits.

Two other "minor" tests developed by various courts merit mention. The first is the "privilege versus right" test established in *Flemming v. Nestor* (1960), where the Supreme Court ruled that Social Security benefits could be denied (at least to communists) because they were benefits, not rights. The issue was raised once again in the *SBC Communication* case when the majority argued that no one has rights to supply telephone service in long-distance markets. Finally, many judicial commentators and analysts have argued that Congress may act proactively, whereas only the courts may act retroactively. In fact, the ex post facto restriction in the Constitution makes that point clearly. Thus, for Congress to extract any tax for past abuses becomes constitutionally suspect . Indeed, Justice Frankfurter insisted that bills of attainder apply *only* to punishments for past acts.

9. Examples include *Brown* and *Lovett* and a Fifth Circuit Court of Appeals decision in *Doe v. Selective Service* (1983). However, the standard was relaxed during the Red Scare of the 1950s and 1960s.

10. In a Montana abortion case, *Mazurek v. Armstrong* (1997), the Montana legislature passed a bill that denied one person the right to conduct abortions. However, the Court ruled that the denial was a regulatory act. In *SBC Communications, Inc. v. FCC* (1999), the denial of access to certain markets for certain companies was also interpreted as regulatory.

11. Even Justice White, who tended to agree with Justice Frankfurter's view of punishment, conceded that legislative history could be examined to determine if laws were meant to be punitive or regulatory.

The courts have spent less time specifying what constitutes an *easily ascertainable group,* perhaps because the concept, at first glance, appears self-explanatory. If an individual has been named in legislation, then obviously the test has been met, but the issue is more complicated when one tries to identify a group, raising what judicial commentators tend to term the "specificity" test. In *Brown* and *Lovett,* it was implied that simply specifying groups or individuals tripped the specificity test of the attainder clause. However, the current Supreme Court has shied away from such a simplistic definition. In *Plaut v. Spendthrift Farm, Inc.* (1995), the Court asserted, "Laws that impose a duty or liability upon a single individual or firm are not on that account invalid . . . or else we would not have the extensive jurisprudence [on] the Bill of Attainder Clause" (514 U.S. 211, at 239). As a result of the ambiguity of such contradictory interpretations, the Court usually prefers invoking the punishment test to invoking the specificity test.

The third criterion for a bill of attainder is a lack of judicial protection. In *INS v. Chadah* (1983), Justice Powell explains the rationale for the third criterion: "It was to prevent the recurrence of such abuses that the Framers vested the executive, legislative and judicial powers in separate branches. Their concern that a legislature should not be able to unilaterally impose a substantial deprivation on one person was expressed not only in this general allocation of power, but also in more specific provisions such as the Bill of Attainder Clause" (462 U.S. 919, at 962). The judicial-protection test has been useful for clarifying differences between regulatory bills and attainder bills. In *Hawker v. New York* (1898), the Court ruled that a statute barring convicted felons from practicing medicine was not a bill of attainder because the courts, not the legislature, determines the felony status of an individual. However, in *Brown,* no court determined anyone's guilt for being a member of the Communist Party. *Hawker* upheld the statute, whereas *Brown* rejected the statute. Thus, the judicial-protection test aims to ensure procedural safeguards absent in a legislative proceeding. In many respects, the bill of attainder clause amounts to a "due process" protection preceding the Fifth and Fourteenth Amendments.

Analysis of Reparations Packages

Having examined the history of the bill of attainder and surveyed the various tests the courts have created, let us now apply those tests to the reparations acts described earlier in order to determine if they constitute bills of attainder.

First, however, we should distinguish the different types of events listed in table 2. They can be divided into two groups—*historical crimes* and *social crimes*—and, for present purposes, I define the former as having three elements. First, a consensus exists that the behavior was wrong. Few would dispute, for example, that the race riots, slavery, the Inquisition, and the Holocaust were wrong. Second, no single actor bears responsibility for the "crime." All of these crimes were carried out with the help, tacit approval, or energetic promotion of hundreds, if not millions, of individuals,

often with the help of institutions and government officials. Third, even if selected individuals can be identified as responsible, they are dead, as are the actual victims of the crime. Thus, the only way to punish a historical crime is to hold a third party accountable. An example might be to hold current U.S. citizens responsible for the actions of U.S. slaveholders more than 137 years ago. There is a consensus that slavery was wrong, but no identifiable actor is responsible for the crime, and both the victims and victimizers are dead.

A *historical crime* differs from other historical wrongs, which we might call *social crimes,* in two important respects. For a social crime, the victim or victims are still alive, and therefore they have recourse to the courts. Reparations, in contrast, circumvent the courts. If the victim of an individual, corporate, or other institutional action has a grievance, that individual may legitimately seek a remedy in the courts. However, if the individual or group seeks and achieves redress through a legislative body, the legislature has created a bill of attainder.

I do not mean to suggest that every attempt to seek restitution for the historical events listed in table 2 would result in a bill of attainder. That would be the result only if a group or an individual received reparations through legislative action. To help draw a distinction, consider two of the events listed in the table. Under the terms developed in this article, the Attica Prison riot is a social crime, and slavery is a historical crime because the victims of the former have an avenue of redress through the courts, whereas the direct victims of slavery are dead. Therefore, the only way to achieve redress for slavery is for third parties to seek restitution through a legislature, which would be to seek the passage of a bill of attainder.

An interesting case concerns the internment of Japanese Americans during World War II. At the time of the compensation for this wrong, the direct victims were still alive. If compensation had been paid via a court order, no accusation could be made with respect to the bill of attainder clause. However, because compensation came from Congress, the relevant enactment was indeed a bill of attainder. Congress could have avoided this constitutional problem by adopting a different approach. Had Congress simply approved legislation stipulating the process by which internees might seek redress through the courts—specifying standing, caps on damages, and statutes of limitation—then the violation of the bill of attainder clause could have been avoided.

Are reparations packages legislatively imposed punishments on easily ascertainable groups who do not have judicial protections? There may be considerable debate as to whether reparations packages are intended as act of punishments and whether Oklahomans, Floridians, or any other such identified group constitutes an easily ascertainable group.

The fundamental question to be answered is whether publicly imposed taxes to atone for past transgressions amount to a punishment. Or, simply put, can a tax be a punishment? I maintain that with respect to publicly financed reparations packages, taxes are fines intended to atone for past grievances, and therefore they are intended

as punishment. However, even if fines constitute a punishment, do they meet the criteria for punishment as established in constitutional precedent? We must apply the historical, functional, and motivational tests to decide.

The historical test requires that the bill at issue imposes a punishment that historically has been considered a punishment in bills of attainder: execution, banishment, seizure of property, and denial of access to certain forms of employment. In the historical sense, only the seizure of property criterion appears to apply. If one considers money "property" and the government's taxation of that money "seizure," then reparations packages meet the historical test.[12] In *Fletcher v. Peck,* the Court defined punishment with respect to the ex post facto clause by saying, "Such a law may inflict penalties upon the person, or may inflict pecuniary penalties *which swell the public treasury.* The legislature is then prohibited from passing a law by which a man's estate, or any part of it, shall be seized for a crime which was not declared by some previous law to render him liable for punishment" (10 U.S. 87, at 138, my emphasis). If such a definition of punishment is applicable to ex post facto laws, it should apply as well to enacted attainder bills.

Even if the courts do not consider legislatively imposed fines in the form of taxes a historical punishment, such acts still might meet the standards set by the functional test. This test asks whether the law under challenge may reasonably be said to further nonpunitive legislative purposes, in view of the type and severity of the burden imposed. What could be the nonpunitive aspects of a reparations package? If the overall purpose were to enact racial healing, then why would not a simple resolution of apology suffice? Why must the apology be accompanied by a redistribution of wealth? If the intent were not to punish, then why would a fine be imposed on the public? An expression of sorrow and a sincere request for forgiveness constitute an apology. A state-imposed requirement that something of value be transferred from one party to another is a fine and therefore a punishment.

The motivational test asks whether the act was intended as a punishment. For example, in the Rosewood case, Florida House Bill 591 sets out the specifics of the reparations package. It also suggests that punishment was a serious motivation of the bill. Section 2 states, "The Florida Department of Law Enforcement is hereby directed to investigate the crimes committed in and around Rosewood, Florida, in 1923 to determine if any criminal prosecutions can be pursued." In *The Debt: What America Owes to Blacks,* Randall Robinson raises the issue of punitive damages owed to blacks for the history of slavery in the United States. By definition, punitive damages are designed to punish. Punitive damages levy fines above and beyond what is needed simply to compensate.

12. Glen Clark has drawn another, but important, distinction between taxes and fines. He notes, "Congress [and state legislatures are] empowered to tax, but generally this power may only be exercised prospectively. The courts, on the other hand, have the ability to levy judgments, which by their nature are retrospective. To this extent, courts differ from legislatures" (1993, 24). Under this logic, the legislature should not have the authority to tax citizens to compensate for "retrospective" actions.

In a legal sense, to meet the motivational test one must ask, as the courts have in the past, Is the state attempting to achieve a regulatory goal instead of punishment? In the case of reparations packages, what might the state be trying to control? The only sensible answer is that the state is trying to prevent future race riots or, more generally, future historical crimes. Such an argument falls flat, however, when one considers the facts of most reparations claims. The Tulsa race riot occurred in 1921, the Rosewood Massacre in 1923. Slavery has been defunct in the United States for more than 130 years; the Holocaust occurred more than 50 years ago. Anyone who actually committed these crimes—with the possible exception of the perpetrators of the Holocaust—is certainly already dead. Therefore, to say that a reparations package is intended as a deterrent against future historical crimes is ludicrous. If one knows that punishment will not be imposed for several generations and that the burden of the punishment will fall on one's descendants and on other unfortunate people who happen to migrate to the area of the historical crime, then no one will be deterred by the prospect of future reparations, and hence no rational person can claim that reparations packages are regulatory by virtue of a deterrent effect.[13]

In sum, according to all three tests developed by the courts, it is clear that a reparations package constitutes a punishment.[14] Therefore, the next question to consider is: A punishment inflicted on whom?

Are citizens of states "easily ascertainable groups"? Some might argue that a tax imposed on all citizens of a state does not single out an easily ascertainable group and because everyone pays the tax used to finance reparations packages, they are no different from any social welfare program. Everyone pays taxes to support welfare programs, yet only a select group of citizens receives the benefits. Under this logic, if reparations packages are bills of attainder, then any selectively disbursed public good evinces a bill of attainder.[15]

This argument is incorrect on two accounts. First, social welfare benefits are available to everyone. Even if they are selectively disbursed, anyone might qualify over the course of a lifetime. Although an upper-middle-class citizen does not receive any benefit from a welfare program targeted at low-income recipients, he might to do so if his circumstances were to change. With a reparations package, however, this potential eligibility does not apply. The only people eligible are descendants of victims of the historical crime. Most citizens are not currently eligible to be compensated via a reparations package, and, more important, they can never become eligible.

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13. Some justices are adopting the view that even "prophylactic" measures intended to deter future violations also violate the bill of attainder clause. See Justice Smith's dissent in *SBC Communications, Inc. v. FCC.*

14. It should be noted that the Supreme Court requires that only one of the three tests be met in order for a bill of attainder to exist. In both the *Nixon* and the *SBC Communications* cases, the Court established that none of the three definitions of punishment had been met before it denied the attainder claim.

15. This logic is employed by many commentators who argue that reparations packages are constitutional. Defenders of reparations packages typically argue that such legislation does not violate the Fourteenth Amendment because the Supreme Court has regularly upheld laws and financial distribution programs that do not apply to all individuals or groups evenly—for example, the GI Bill of Rights, homeowner tax exemptions, and welfare payments to the poor alone. See Bittker 1973 for a review of this argument.

The argument's second defect is more subtle. In the case of the Tulsa race riot, imagine a citizen who has lived in Oregon his entire life. Neither he nor any of his ancestors have lived in Oklahoma. Tomorrow he moves to Oklahoma. Is he now subject to a penalty to which he previously was not? If he leaves Oklahoma the following day, will he then become free from that penalty? The answer is "yes" on both counts. If a citizen can subject himself to or escape from a fine or penalty simply by becoming or ceasing to be a member of a certain group (Oklahomans, Floridians, U.S. citizens, or Germans), then obviously it is true that only a specific, easily ascertainable group is subject to the fine imposed by a reparations package.

Inability to identify easily ascertainable groups in an unambiguous way, however, has not prevented some justices from raising bill of attainder concerns. In *City of Richmond vs. Croson* (1989), the plaintiff argued that setting aside 30 percent of all city contracts for minority-owned businesses violated the Fourteenth Amendment. In his dissent, Justice Stevens questioned whether legislatures could act to remedy past wrongs. He suggested that such legislative remedies might violate both the ex post facto and bill of attainder clauses:

> this litigation involves an attempt by a legislative body, rather than a court, to fashion a remedy for a past wrong. Legislatures are primarily policymaking bodies that promulgate rules to govern future conduct. The constitutional prohibitions against the enactment of *ex post facto* laws and bills of attainder reflect a valid concern about the use of the political process to punish or characterize past conduct of private citizens. It is the judicial system, rather than the legislative process, that is best equipped to identify past wrongdoers and to fashion remedies that will create the conditions that presumably would have existed had no wrong been committed. Thus, in cases involving the review of judicial remedies imposed against persons who have not been proved guilty of violations of law, I would allow the courts in racial discrimination cases the same broad discretion that chancellors enjoy in other areas of the law. (488 U.S. 469, at 513)

Significantly, Justice Stevens's comments do not evince a concern that the identifiable group being punished by the contract set-asides is simply the generalized group of nonminority persons in Richmond. Instead, he seems to accept that the Court may adopt a very liberal understanding of what constitutes an easily ascertainable group.

The final criterion that marks legislative acts as bills of attainder is the lack of judicial recourse. Nothing in reparations packages allows citizens to pursue judicial action in order to be exempted from bearing the burden of the financial costs imposed by the bill. No citizen of Florida, Oklahoma, the United States, or Germany may go before a court and argue that neither he nor his ancestors were present at Rosewood, Tulsa, the antebellum United States, or Germany (1933–45) and that they bear no responsibility for the specific wrongs committed at those places. Instead, their only judicial recourse is to argue that the entire bill is unconstitutional.

Conclusion

The *Lovett* decision defined a bill of attainder as a legislative act that inflicts punishment on named individuals or on easily ascertainable groups without a judicial trial. The examination of certain reparations packages (monetary reparations) here indicates that such legislation meets all three criteria established by the courts to identify bills of attainder. Reparations packages that seek monetary damages to be redistributed from one subset of the population to individuals in a different subset of the population are legislatively enacted punishments. This type of legislation punishes easily ascertainable groups that do not have judicial protections.

Reparations packages resurrect the long-abandoned notion that people should be held responsible for the "sins of the father." By including the bill of attainder clauses in the Constitution, the Framers tried to limit the ability of legislatures seeking momentary political rewards to impose penalties on individuals or groups. It is one of the few bans in the Constitution explicitly placed on both the national and state governments. The Framers, probably more than any other political caucus, understood the danger of giving legislatures a free hand to enact whatever legislation happened to be currently popular. As a result, they blended a combination of democratic, republican, and autocratic principles into the Constitution. To prevent legislatures from being caught up in momentary passions, they simply banned certain types of legislation. Thus, Congress was denied the right to pass ex post facto laws, levy capitation taxes, issue titles of nobility, or enact a variety of other laws, including bills of attainder. Drawing on their English roots, the Framers understood that legislative bodies might seek to punish groups in society. In English history, individuals had often been punished simply for belonging to a specific group, such as Protestants or Catholics. The bill of attainder clause essentially sought to protect the people from themselves. Such protection is needed currently in relation to reparations packages. Today, as in centuries past, such laws tempt legislatures to appeal to divisive racial, ethnic, and religious cleavages for current political gain.

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